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No. 880

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

CLINTON WOODSON,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Clinton Woodson, prays for the issuance of a writ of certiorari to review the decisions of the Supreme

Court of the State of Michigan, in affirming on September 11, 1944, the judgment of the Recorder's Court for the City of Detroit, in the State of Michigan, and in denying on December 1, 1944, petitioner's request for rehearing, in connection with certain criminal proceedings.

I.
STATEMENT OF THE CASE

Petitioner was convicted in the Recorder's Court for the City of Detroit, Michigan, upon an information charging him with having committed perjury while testifying in the Circuit Court for the County of Wayne, in that State, during the trial of the case of *People v. Roxborough* and others (R. 4-7).

Evidence was introduced by the people to show that petitioner was duly sworn as a witness in the *Roxborough* case (R. 9), and that he there testified with reference to certain activities of himself and others in the numbers and policy business in the City of Detroit (R. 29).

The people, in order to prove that this testimony of petitioner was false, introduced certain other "testimony," claiming it to be inconsistent and true, previously given by him before Circuit Judge Ferguson sitting as a "one-man grand jury"* (R. 11-26).

Petitioner repeatedly objected to such use against him of his statements to the grand jury on the ground that

---

*Judge Ferguson, as the "one-man grand jury" was acting pursuant to secs. 17217 *et seq.*, Comp. Laws 1929 of the State of Michigan (Stat. Ann. secs. 28.943 *et seq.*)

he was there compelled unconstitutionally to incriminate himself, inasmuch as he was required to testify without immunity having been granted to him as required by the statute.* The trial Court nevertheless held the evidence admissible (R. 80-84, 96).

At the close of the people's proofs, motion for directed verdict was made and denied (R. 147). Petitioner refused to introduce evidence in his behalf, insisting that the people had failed to prove a case. He was found guilty and sentenced to the State Prison for a term of from 2 to 15 years. Motion for a new trial was made, renewing the objection to the use of the grand jury testimony (R. 161, 165-6). This motion was denied (R. 171).

Thereafter, in due course, appeal was taken, urging the same objections, to the Supreme Court of the State of Michigan, that being the highest court in that State, which affirmed the conviction of appellant (R. 174-180), Wiest, J. dissenting (R. 180-187). On October 2, 1944, extension of time to October 11, 1944, to file application for rehearing was granted by the State Court (R. 188). The application was filed on October 10, 1944 (R. 189-202), and was denied on December 1, 1944 (R. 203).

---

*Sec. 17220 Comp. Laws 1929 of the State of Michigan (Stat. Ann. sec. 28.946).

II.
QUESTION PRESENTED

Was petitioner deprived of that due process law guaranteed him by Sec. 1 of the 14th Amendment to the Constitution of the United States, by the use against him of self-incriminating testimony involuntarily obtained from him by the "one-man grand jury," which failed to grant him immunity?

III.
REASONS FOR ALLOWANCE OF THE WRIT

1. The Michigan Supreme Court has considered and denied petitioner's claim of rights guaranteed him under the Constitution of the United States, 14th Amendment, Sec. 1, in sustaining the people's use against him of self-incriminating evidence obtained by compulsion and duress, and by forcing him into a waiver of his constitutional right not to testify against himself.

2. The Michigan Supreme Court considered the application of Sec. 17220, Comp. Laws 1929, to the facts of this case, and the supposed order of the one-man grand jury granting immunity, which was in fact a nullity, and decided against petitioner's claim that such judicial procedure and its subsequent abortive use violated his right to due process of law under the aforesaid provision of the Constitution of the United States.

3. The question involved is of general public importance, affecting the fundamental fairness of judicial proceedings.

4. The Michigan Supreme Court has decided herein a federal question of substance not determined by this Court, and its decision is not in accord with the line of decisions of this Court on the exclusion of compulsory self-incriminating evidence.

IV.
PRAYER

WHEREFORE, petitioner, Clinton Woodson, prays that a writ of certiorari issue under the seal of this Court directed to the Supreme Court of Michigan commanding the said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court had in this cause numbered on its docket No. 42-340, and entitled "*People of the State of Michigan, Plaintiff and Appellee, v. Clinton Woodson, Defendant and Appellant.*" to the end that this cause may be reviewed and determined by this Court and that the judgment of the said Supreme Court of Michigan be reversed and for such further relief as this Court may deem proper.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.
OPINIONS OF THE COURTS BELOW

The opinion, including the dissenting opinion, of the Supreme Court of Michigan is reported in 309 Mich. 391, and is printed at pages 174-187 of the record.

The opinion of the trial court, in denying the motion for new trial, is unreported, and appears in the printed record at pages 168-171.

II.
JURISDICTION

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C., Section 344).

III.
STATEMENT OF CASE

A summary statement of the case has already been made in the Petition for a Writ of Certiorari under heading I, which is hereby adopted and made a part of this brief.

IV.

SPECIFICATIONS OF ERROR AND SUMMARY OF ARGUMENT

The Supreme Court of Michigan erred in holding that the use of the incriminating testimony, unconstitutionally coerced from petitioner by the so-called "one-man grand jury," to convict him of a subsequent crime, did not deprive petitioner of due process and equal protection of the law, as guaranteed by Section 1 of the 14th Amendment of the Constitution of the United States.

ARGUMENT

In December, 1939, Judge Homer Ferguson was sitting as a one-man grand jury, under secs. 17217, *et seq.*, Comp. Laws 1929, of the State of Michigan (Stat. Ann., secs. 28.943, *et seq.*) investigating certain gambling offenses in Wayne County (R. 96). Petitioner was summoned before him and questioned with reference to his own gambling operations. The record shows that the following transpired there (R. 14-15):

> "Q. (By Mr. O'Hara†) You have been engaged in operating a policy game in this town?
>
> A. I refuse to answer for fear it might incriminate myself. * * *
>
> Mr. O'Hara: I ask the Court to grant this man immunity under the statute, and require him to an-

† The *Amicus curiae* appointed by Judge Ferguson (R. 96).

swer the questions put to him, the same as though they were reduced to writing, pursuant to the statute, so that he will not be prosecuted for any answers that he gives on this record.

The Court: The law provides that when you claim a privilege that way, the Court can grant you immunity. Now, according to the statute in this case made and provided the Court does now grant you immunity the same as if each of these questions was in writing, and your answer in writing; *now the Court must require you, after granting you this immunity, that you answer the questions;* now when they ask you similar questions that might incriminate you, I will take it that you are claiming the same privilege, and I am now granting you immunity on all the questions and all the answers in this record. *So now you must answer."* (Emphasis supplied.)

At a later point in the examination, petitioner again refused to answer but was compelled to do so on threat of punishment (R. 17):

"During the time that you became associated with him, isn't it a fact that you were paying $100 a month to Mr. Watson, was charged up against your profit and loss account, for protection from the Prosecutor, McCrea?

A. Should I claim that it might incriminate me?

The Court: I grant you the same privilege as I heretofore granted you under the statute, the same as if the question was in writing, and *I now require you to make the answer. That will apply to all your questions, so you can go ahead and answer."* (Emphasis supplied.)

Mr. O'Hara, in these proceedings, was not acting as a representative of either the prosecuting attorney or the

attorney general, but merely as *amicus curiae* to the Court. The immunity sought to be conferred on petitioner was pursuant to sec. 17220, Comp. Laws 1929 of the State of Michigan (Stat. Ann., sec. 28.946), which provides:

> "No person shall upon such inquiry be required to answer any questions the answers of which might tend to incriminate him except upon motion in writing by the prosecuting attorney which shall be granted by such justice or judge, and any such questions and answers shall be reduced to writing and entered upon the docket or journal of such justice or judge, and no person required to answer such questions upon such motion shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him."

Subsequently, at the trial of *People v. Roxborough*, petitioner was called as a witness for the people. He is now charged with having committed perjury in that trial, and has been convicted of this crime by the Recorder's Court of the City of Detroit (R. 158) as affirmed by the State Supreme Court (R. 188). He was sentenced to prison for a term of 2 to 15 years (R. 158).

On the trial in the present case, the people, in order to prove the falsity of the testimony given by petitioner in the *Roxborough* trial, introduced in evidence the transcript of petitioner's testimony given previously before Judge Ferguson. This testimony was read at length to the jury (R. 14-23). It is apparently conceded that the testimony thus used was material and persuasive in petitioner's conviction, and if erroneously admitted, must result in reversible error†. Nor is any other conclusion warranted by the record.

†The majority opinion states "It appeared that certain parts of his testimony in the *Roxborough* Case were contrary to and in conflict with his grand-jury testimony on the same subjects" (R. 175).

Petitioner's counsel requested the Trial Court to strike the grand jury testimony, on motion for directed verdict (R. 133-4, 137-9), and again on motion for new trial (R. 165-6) on the ground that the supposed immunity granted petitioner by Judge Ferguson was a nullity since the motion therefor was made by Mr. O'Hara, a mere *amicus curiae*, and not by a prosecutor's or attorney general's representative, as required by the statute, and that, consequently, petitioner's constitutional right not to incriminate himself† had never been overcome and still protected him. The Trial Court, although conceding the irregularity of the immunity granted, nevertheless upheld the admission of the testimony on the ground that petitioner "relied upon that immunity, and gave voluntary answers" (R. 170). The same objection was pressed on appeal to the State Supreme Court and in petitioner's application to that court for re-hearing (R. 193-200).

Petitioner also claimed that the use of such self-incriminating statements thus forced or tricked from him, denied him due process of law in violation of the Constitution (R. 200). The point was vehemently urged to the State Supreme Court and briefed in the application for rehearing (R. 200). But that Court carefully avoided the decision of this fundamental question by holding the grand jury evidence admissible.

The majority of the State Supreme Court readily concede that the supposed immunity granted petitioner was a nullity and "his refusal to answer would not have placed him in contempt" (R. 177). The concurring opinion, moreover, concedes that "the so-called immunity granted

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†Article II, sec. 16, of the Michigan Constitution of 1908 provides that "No person shall be compelled in any criminal case to be a witness against himself."

defendant in the grand jury proceedings was a nullity insofar as making him immune from prosecution for criminal acts testified to in such proceedings Such testimony must be considered to have been given involuntarily and as such was inadmissible . . ." (R. 179).

But the majority nevertheless hold the evidence admissible against petitioner because "he apparently testified before the grand jury in reliance upon and without questioning the legality of the purported grant of immunity" (R. 177).

The record shows, however, that he testified in fear of going to prison. When he first refused to answer because he feared to incriminate himself, Judge Ferguson said (R. 15):

> "Now when they ask you similar questions that might incriminate you, I will take it that you are claiming the same privilege, and *I am now granting you immunity on all the questions and all the answers in this record. So now you must answer. All right.*" (Emphasis supplied.)

Later, when he again refused to answer incriminating questions, Judge Ferguson said (R. 17):

> "I grant you the same privilege . . ., and *I now require you to make answer. That will apply to all your questions, so now you can go ahead and answer.*" (Emphasis supplied.)

Confessions or admissions thus obtained under duress or compulsion are never admissible.

> *State v. Clifford*, 86 Iowa 550;
> *People v. Wolcott*, 51 Mich. 612;
> *Simmons v. State*, 79 Tex. Crim. Rep. 341;

Shoeffler v. Wisconsin, 3 Wis. 823;
22 *Corpus Juris Secundum*, 1002.

See also:

Regina v. Garbett, 2 Car. & K. 474, 495.

The decision in the instant case is wholly irreconcilable with the unswerving policy of the State Supreme Court condemning the fruits of any search and seizure made in violation of constitutional safeguards.

Cf. *People v. Hagadorn*, 255 Mich. 121.

In the illegal search and seizure cases, the evidence is intrinsically competent, but only by suppression of the fruits can the spirit and purpose of the Constitution be perpetuated.

People v. Halvesz, 215 Mich. 136, 138;
Cf. *McNabb v. United States*, 318 U. S. 332, 345.

The same rule must apply when the incriminating material is unlawfully taken from the mouth of the witness as applies when a document is unlawfully taken from his desk.

The applicable rule is stated in American Law Institute, Model Code of Evidence, Rule 232, page 171:

> "Evidence of a statement or other disclosure made by a person is inadmissible against him if the judge finds that he had and claimed a privilege to refuse to make the disclosure but was nevertheless required to make it."

The conviction of petitioner was accomplished by the use of self-incriminating evidence unconstitutionally co-

erced from him by Judge Ferguson. In fact, since that entire proceeding before Judge Ferguson was in direct violation of the constitutional provision against self-incrimination, that testimony was a nullity and could not be used for any purpose.

Emery v. State, 57 Tex. Crim. Rep. 423.

Failure to pursue constitutional provisions results in a suspension of the Court's jurisdiction to proceed.

Johnson v. Zerbst, 304 U. S. 458;
Cf. *Ex parte Fisk*, 113 U. S. 713.

A conviction resting on evidence secured through a flagrant disregard of the procedure which the law commands, cannot be allowed to stand.

McNabb v. United States, supra.

The use of self-incriminating statements judicially coerced from petitioner to bring about his conviction is a denial to him of that due process of law guaranteed him by the 14th Amendment to the Constitution of the United States.

The use of confessions coerced from a defendant to obtain his conviction voids a trial for it denies to him due process of law.

Lisenba v. California, 314 U. S. 219;
Ward v. Texas, 316 U. S. 547.

The concept of due process of law voids a trial in which, by threats or promises in the presence of the court, a defendant is induced to incriminate himself.

Lisenba v. California, supra.

Recently, on May 1, 1944, this Court in *Ashcraft v. Tennessee*, 322 U. S. 143, reversed a conviction obtained by the use of confessions coerced by law enforcement officers.

That case held (322 U. S. 155):

> "The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession."

Under the holding of that case, moreover, this Court is required to make an independent examination of petitioner's claim regardless of the findings of the jury and the state courts.

CONCLUSION

The use of the self-incriminating statements judicially extorted from petitioner by the one-man grand jury, to obtain the present conviction, denied him due process of law, and the protection of the 14th Amendment to the Constitution of the United States. Coercion by the judiciary which, for a free people, must always be the quintessence of integrity, is much more insidious than the usual confession extorted by police officers, for from them there is an appeal to the courts. But from the courts there can be no appeal.

Petitioner has been compelled to incriminate himself by forcing him to surrender his right to immunity.

We therefore pray that a writ of certiorari issue from this Court to the Supreme Court of the State of Michigan to review its affirmance of said conviction of petitioner by the Recorder's Court for the City of Detroit, in the said State of Michigan, and said Court's denial of his application for rehearing, and that the judgment of said Court be reversed on hearing and the cause remanded for further proceedings within the limitations of established constitutional restraints.

Respectfully submitted,

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v.

THE PEOPLE OF THE STATE OF MICHIGAN.

Respondent's Brief Opposing Petition for Writ of Certiorari to the Supreme Court of the State of Michigan.

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Respondent's Brief Opposing Petition for Certiorari.

I

Counter-Statement of Matter Involved. [*]

This counter-statement is deemed necessary in correcting the following inaccuracies and omissions in the statement of the other side (Rule 27):

1. In addition to the transcript (14) of testimony educed from petitioner during the proceedings had be-

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[*]

Unless otherwise plainly indicated, numbers in parentheses refer to pages of the printed transcript of record.

fore the investigating judicial officer,[1] there was further proof to sustain the verdict (158) convicting petitioner of the offense of perjury (4-7) committed by him in testimony (58-78) given during the trial of John Roxborough, Richard W. Reading and others.[2]

Immediately after testifying in the *Roxborough* case, petitioner admitted to the special prosecutor, and to other persons, that he had testified falsely. The prosecutor's testimony (96-102) as to petitioner's admission of perjury was corroborated by an assistant prosecutor (102-103), an assistant attorney general (104-105), and a police officer (119-130). A partner and former business associate of petitioner in the gambling business testified (79-118) as to facts which indicated that petitioner testified falsely in the *Roxborough* case. The court below noted (309 Mich. 391, 398) that 'defendant did not take the stand and offered no testimony in the present case'. (178).[3]

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[1]

Such an investigating magistrate is popularly referred to in this State as a 'one-man grand jury', though the term is somewhat misleading. See: McCrea v. Michigan (No. 651, October Term 1942), 318 U.S. 783; Robinson v. Michigan (No. 474, October Term 1943), 320 U.S. 799; Roxborough v. Michigan (Nos. 98-99, October Term 1944), 89 U.S. [L. ed.] 55.

[2]

People v. Roxborough, 307 Mich. 175 (certiorari denied Oct. 16, 1944, 89 L. ed. 55); People v. Watson, 307 Mich. 596 (certiorari denied Oct. 16, 1944, 89 L. ed. 55).

[3]

The Michigan Supreme Court was 'satisfied that there was material and ample evidence from which the jury, as judge of the facts, could find him guilty beyond a reasonable doubt of the crime charged'.

2. While petitioner repeatedly objected (12, 13, 23, 133, 138, 139, 143, 165, 166) to the use of the transcript of testimony taken by the investigating magistrate, he did not do so on any Federal constitutional ground, and the question now presented was not raised until his counsel moved the court below for a rehearing on appeal (189-205).

II

Lack of Jurisdictional Statement.

It is stated under the heading 'Jurisdiction', in petitioner's supporting brief, that 'the jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C., Section 344)', but neither brief nor petition contain a statement 'particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment . . in question'. This, we respectfully submit, does not meet requirements (Rule 12, par. 1; Rule 38, par. 2).

III

Counter-Statement of Questions Presented.

As we view it, the following questions are to be considered:

1. Does petitioner's statement of jurisdiction comply with the rules of this Court (Rule 12, par. 1; Rule 38, par. 2), and is any Federal question involved in the proceedings below (28 USC § 344 [b])?

2. Is there any substance in petitioner's contention that the State of Michigan denied him the 'due process' guaranteed by the Fourteenth Amendment to the Constitution of the United States?

IV

Reasons for Opposing the Allowance.

Our reasons for opposing the petition may be summarily stated by answering each of the foregoing questions in the negative.

1. No Federal question was raised in the court below until the petitioner moved for a rehearing, and then it came too late.[4] The objections (12-13) interposed to the introduction in evidence of the transcript of testimony given by petitioner before the investigating magistrate, the grounds asserted (130-149) for a directed verdict, and a new trial (161-166), the assignments (1-3) of error on appeal to the State Supreme Court, and the questions decided, were based on nonfederal grounds,[5] and no 'title, right, privilege, or immunity' was specially set up or claimed by petitioner under the Constitution of the United States (28 USC, § 344 [b]).

2. There is no merit in petitioner's contention that he was denied due process.

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[4]
Herndon v. Georgia, 295 U.S. 441.

[5]
Neblett v. Carpenter, 305 U.S. 297,
Alton R. Co. v. Ill. Commerce Commission, 305 U.S. 48,
Honeyman v. Hanan, 300 U.S. 14,
United States v. Hastings, 296 U.S. 188.

V

Argument

Point One

No federal question was timely raised in the court below, and jurisdiction in this Court is not indicated.

This is clearly one of those cases where, after conviction of crime and affirmance of the verdict by the highest State court, the record is combed in the hope that a latent Federal question or some lurking denial of due process may be discovered.

First: Counsel relies on the provisions of § 237-b of the Judicial Code as amended (28 USC, § 344-b), but he has failed particularly to disclose that any constitutional right guaranteed by the Fourteenth Amendment, was asserted, 'set up or claimed' (Rule 38-2; Rule 12-1).

It would perhaps be merely trite to state that, before this Court will assume jurisdiction to review a judgment of the highest court of a State, the Federal right must have been set up and adjudicated by the state court;[6] that such a question is not available here unless presented and ruled upon in the state supreme court, even though raised in the trial court;[7] that a writ of certiorari will be dismissed where the record fails to disclose that the complaining party definitely raised the Federal

---

[6]
Cleveland & P. R. Co. v. Cleveland, 235 U.S. 50.

[7]
Hiawassee River Power Co. v. Carolina-Tennessee Power Co., 252 U.S. 341.

question in the State court;[8] and that, in order to raise a Federal question the Federal right must be asserted according to the state procedure.[9]

So, too, this Court will not review the judgment of a state court where it is clear that decision was based on other than Federal grounds.[10]

Second: At no stage of the proceedings in the court of first instance, did petitioner or his counsel raise the Federal question sought to be reviewed here.

1. After the transcript (14) of testimony given by petitioner before the investigating judicial officer, had been authenticated by the court reporter, and when the latter was requested (12) to read the questions and answers, petitioner's counsel objected (12) 'to this unless it contains all of the questions and answers that were put to Mr. Woodson'.[11] The transcript (14-26) was read

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[8]
Missouri Pac. R. Co. v. Hanna, 266 U.S. 184.

[9]
L. & N. R. Co. v. Woodford, 234 U.S. 46.

[10]
Harding v. Illinois, 196 U.S. 78.

[11]
The grounds of such objection were stated by counsel as follows:

"Mr. Rowlette: I object to any testimony as to the specific questions which were asked, at this time, and which, as claimed, is the basis of this lawsuit here, unless all of that testimony is given, for this reason: That there may be other parts of the testimony taken between the hours of 3:00 p.m. and midnight on December 6, 1939, or 2:00 o'clock in the morning, or whatever time it was, or 12:00 midnight, that may clarify these matters and show that there was no perjury or no variance between any testimony taken before Judge Ferguson on December 6, 1939, and the testimony taken before Judge Pugsley on October 22, 1941 (13)".

by the reporter without further objection; and cross-examination was waived (23, 26). It is certain that petitioner asserted no Federal rights guaranteed by the Constitution of the United States.

2. Although counsel correctly states that, 'at the close of the people's proofs, motion for directed verdict was made and denied' (130-149), and while it is also true that petitioner moved the court at the same time to strike from the record the testimony of one Charles Mosley (130), none of these motions was based on any asserted right guaranteed by the Constitution of the United States.

The motion to strike out testimony (130), rested on the sole ground that a conviction of perjury could not be sustained on the uncorroborated testimony of one witness as to the falsity of the matter on which the charge was assigned (131); and the motion for a directed verdict was urged on several grounds: it was urged that petitioner had not been granted immunity[12] from prosecution for any offense concerning which he may have incriminated himself while testifying before the investigating magistrate (133); therefore, it was argued, he was under no obligation to tell the truth on that occasion, and, not being so obligated, the testimony which he gave could not be deemed 'wilful perjury' (133, 134, 138, 139, 149).

But at no time was it expressly claimed that petitioner had been deprived of due process of law (guaranteed by the 14th Amendment), on the ground that he had been compelled in a criminal case to be a witness against himself.

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[12] See Mich. Comp. Laws 1929, § 17220 (Stat. Ann. § 28.946).

3. After a verdict (158) of guilty had been rendered and the defendant had been sentenced, he filed a motion for new trial (161-166), which was denied (168-171). But in none of the grounds assigned therefor, did the petitioner raise a Federal question or assert a Federal right protected by the Constitution of the United States.

Third: On appeal to the Supreme Court of the State of Michigan, no Federal question was raised, and no constitutional right guaranteed by the 14th Amendment, was claimed or asserted. In stating his 'reasons and grounds for appeal and errors relied upon', petitioner did not mention the Federal Constitution or any rights therein protected (1-3).

Furthermore, the court below did not decide a Federal question, nor did it consider or have before it any asserted right protected or safeguarded by the Constitution of the United States. And Mr. Justice Wiest, who dissented, based his opinion on the Constitution of the State of Michigan (1908), art. 2, § 16, and not upon any provision of the Federal Constitution. Both prevailing opinion and dissent undertook to construe a statute of the State (3 Comp. Laws 1929, § 17220 [Stat. Ann. § 28.946]).[13]

Should it be urged that petitioner based his application (189-202) for rehearing by the Michigan Supreme Court, on the claim that his conviction was 'unconstitutional . . . and in violation of the Fourteenth Amendment' (192), and urged that he had been denied due process of law (200), our answer under authority of a decision of this

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[13]

People v. Woodson, 309 Mich. 391, 402.

court,[14] is that such a claim comes too late for consideration.

We, therefore, respectfully submit that jurisdiction in this Court is not indicated.

Point Two

There is no substance in petitioner's contention that the State of Michigan has denied him due process of law (14th Amendment).

For the sake of clarity, it is necessary to bear in mind the skeleton of this case:— that petitioner was charged (4) with the offense of perjury committed while testifying as a witness at the trial of one John W. Roxborough and others in the circuit court for the county of Wayne, on the 22nd day of October 1941; that, as a part of its case, the State sought to prove contradictory statements made by petitioner when testifying under oath on the previous occasion of a judicial inquiry conducted by another judge of the same court, concerning the offense charged in the information against Roxborough and his co-defendants; and that for this purpose the prosecuting attorney offered in evidence an authenticated transcript of petitioner's testimony taken before the investigating judicial officer (14). This transcript was received in evidence over the objections of petitioner's counsel (12, 13).

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[14]
Herndon v. Georgia, 295 U. S. 441.

The statute which authorizes such a judicial inquiry,[15] provides in part:

> "Sec. 6. No person shall upon such inquiry be required to answer any questions the answers of which might tend to incriminate him except upon motion in writing by the prosecuting attorney which shall be granted by such justice or judge, and any such questions and answers shall be reduced to writing and entered upon the docket or journal of such justice or judge, and no person required to answer such questions upon such motion shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him".

Petitioner's argument is based on the premise that, when called as a witness before the investigating judge, he refused to answer certain questions 'for fear it might incriminate myself' (14, 15); that he was granted immunity upon the oral motion of a lawyer who appeared as *amicus curiae* 'to the grand jury', so-called; that the motion was not reduced to writing as required by the above statute;[16] that the grant of immunity was illegal because not in compliance with the statute; that he was compelled to testify by the investigator and, therefore, his testimony was not voluntary; and that such testimony could not be used against him in his subsequent trial for perjury. The contention is that, since his conviction rested upon what amounted to an extorted confession, he

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[15]

Act No. 175, chap. VII. § 6, Pub. Acts Mich. 1927 (3 Comp. Laws 1929, § 17220 [Stat. Ann. § 28.946]).

[16]

In re Wyrick, 301 Mich. 273,
In re Hickerson, 301 Mich. 278.

was denied due process, and he must be set at liberty under authority of recent decisions of this Court.[17]

1. Several valid, if not controlling, answers to petitioner's contention are found in the opinion of the court below.[18]

This Court will probably feel bound by the construction placed by the Michigan Supreme Court upon the language of the statute in question here,[19] when it said (p. 397):

> "The immunity statute expressly protects a witness against prosecution for any offense concerning which his answers may tend to incriminate him, but it does not protect him from an offense subsequently committed".

And it is observed that

> "defendant's answers before the grand jury did not relate to the offense of perjury, which he committed two years later and, therefore, his answers did not then tend to incriminate him as to such offense".

In short, the statute did not grant him a license to commit perjury with impunity.

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[17]
Ashcraft v. Tennessee, 322 U.S. 143,
Ward v. Texas, 316 U.S. 547,
Chambers v. Florida, 309 U.S. 227,
Brown v. Mississippi, 297 U.S. 278.

[18]
People v. Woodson, 309 Mich. 391.

[19]
11 Am. Jur., Constitutional Law, § 109, note 16, p. 744.

Another answer is found in this common-sense view of the matter (p. 397):

> "As he apparently testified before the grand jury in reliance upon and without questioning the legality of the purported grant of immunity, it may reasonably be inferred that he testified the same and as truthfully as though immunity had been granted in conformity with the statute. . . . Apparently he received the immunity which the statute intended, as there is no showing that he was ever prosecuted as a result of incriminating answers".

2. There is no evidence to sustain the theory that petitioner's conviction was based on a 'confession' extorted from the accused by torture or other means in violation of that due process of law which is guaranteed by the Fourteenth Amendment, and the line of authority upon which petitioner relies (the *Brown*, *Chambers*, *Ward* and *Ashcraft* cases cited in footnote 17 *ante*), does not support his contention.

It is first noted that in each of those cases, conviction rested solely on the compulsory confession.

In *Brown v. Mississippi*, 297 U. S. 278,

> "aside from the confessions, there was no evidence sufficient to warrant the submission of the case to the jury",

and this Court say:

> "It would be difficult to conceive of methods more revolting to the sense of justice than those taken to

> procure the confessions of these petitioners, and the use of the confessions thus obtained *as the basis of conviction* and sentence was a clear denial of due process".

In the case of *Chambers v. Florida*, 309 U. S. 227, the Court observed:

> "When Chambers was tried, his conviction rested upon his confession and testimony of the other three confessors",

who, like him, had been subjected to brutal treatment.

And in *Ward v. Texas*, 316 U. S. 547, it is said:

> "(p. 549) The Court of Criminal Appeals in its final opinion denying petitioner's motion for rehearing concluded 'It may be stated bluntly that no conviction could be sustained in the present case without the confession of appellant' ".

The court below, in the instant case, after reciting established facts other than the contradictory statements found in the grand jury transcript of testimony (petitioner's admissions voluntarily made to the prosecuting attorney, and other persons; the testimony of petitioner's former partner in gambling ventures, 'as to facts which indicated that he testified truthfully before the grand jury and falsely in the *Roxborough* case'), was satisfied 'that there was material and ample evidence from which the jury, as judge of the facts, could find him guilty beyond a reasonable doubt of the crime charged' (p. 398).

In the case at bar, conviction did not rest solely upon a 'confession', for there was other evidence to sustain it; the statements found in the transcript of testimony taken before the judicial investigator, were not in the nature of 'confessions' to the crime of perjury charged in the information in the pending cause; and it cannot be said that such statements were coerced by methods 'revolting to the sense of justice' (*Brown*), or by means of 'the rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross-questioning, and other ingenious forms of entrapment of the helpless or unpopular' (*Chambers*).

The sole compulsion in this case was merely that which is brought to bear on any witness who is called to perform this duty of citizenship.

3. The question then is whether exemption from compulsory self incrimination in the state courts is secured by any part of the Federal Constitution.

But that question is no longer open to debate,

> *Twining v. New Jersey*, 211 U. S. 78,
> *Ensign v. Pennsylvania*, 227 U. S. 592,
> *Snyder v. Massachusetts*, 291 U. S. 97, 105,
> *Brown v. Mississippi*, 297 U. S. 278,
> *Palko v. Connecticut*, 302 U. S. 319,
> *Buchalter v. New York*, 319 U. S. 427, 429.

A State is 'free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. . . . The privilege

against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the State' (*Snyder*).

The right of immunity from compulsory self-incrimination 'might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. . . . Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry' (*Palko*).

Manifestly, then, this Court has drawn a clear line of demarcation between rights asserted under the 'self-incrimination' clause of Federal or State Constitutions, and rights asserted under the due process clause of the Fourteenth Amendment. Under those decisions it is established that a State's withdrawal of the guarantee against self-incrimination is not a denial of due process (*Twining* and *Palko*), but where a conviction rests solely upon a confession illegally and wrongfully obtained through force and violence or mental torture, it cannot be permitted to stand under the due process clause of the Fourteenth Amendment (*Brown, Chambers, Ward* and *Ashcraft*).

Indeed, it may truthfully be said that, in the latter instance, the accused has had no trial, but the question of his guilt or innocence has been determined by tyrants within the precincts of their own torture chamber, rather than in a court of competent jurisdiction (*Chambers*).

Moreover, 'the Amendment does not draw to itself the provisions of state constitutions or state laws' (*Buchalter*).

VI

Conclusion:

No Relief.

On the face of the record, we respectfully submit, petitioner is entitled to no relief, and the writ of certiorari should be denied.

Respectfully submitted,

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